

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY ALAN BROOKS,

Defendant-Appellant.

UNPUBLISHED

March 11, 2003

No. 236553

Ionia Circuit Court

LC No. 01-011858-FH

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a vehicle while under the influence of intoxicating liquor, MCL 257.625(1), third offense, and operating a motor vehicle with a suspended or revoked license, MCL 257.904(1), second offense. Defendant was sentenced to concurrent terms of 23 to 60 months' imprisonment for the OUIL conviction and twelve months' imprisonment for the operating a motor vehicle with a suspended or revoked license conviction. We affirm.

Defendant first argues that he was deprived of his constitutional right to a fair trial because of the prosecutor's improper comments during rebuttal closing argument. Defendant did not object to the alleged improper comments at trial; therefore, our review is for plain error that affected defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant contends that the following statements made by the prosecutor during rebuttal closing argument were improper:

All of his [defendant's] other story [sic] about these other officer [sic] sitting up there is malarkey. It's hard for jurors to believe that somebody can sit up there, take an oath and lie to us. That's exactly what happened today.

* * *

If his girlfriend was with him that day and was truly a half a block away, why didn't he have her take the animals? Where is she today, it's his girlfriend for God's sake. Why doesn't she come here and tell you I was driving?

The prosecutor's statement that defendant lied on the witness stand and his characterization of defendant's testimony as "malarkey" were not improper. A prosecutor is not required to confine arguments to the blandest of all possible terms and may argue from the facts that a witness is not worthy of belief. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Similarly, the prosecutor's statement regarding the absence of defendant's girlfriend was not improper because a prosecutor is permitted to comment on a defendant's failure to produce corroborating witnesses when the defendant testifies on his own behalf. See *People v Jackson*, 108 Mich App 346, 351-352; 310 NW2d 238 (1981). In addition, the trial court properly instructed the jury regarding the burden of proof and that arguments of attorneys were not evidence. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Accordingly, defendant has failed to show plain error affecting his substantial rights, and the prosecutor's comments did not deprive defendant of his constitutional right to a fair trial.

Defendant next argues that MCL 769.34(10) is unconstitutional. Defendant did not raise this issue before the trial court therefore, again, our review is for plain error affecting his substantial rights. See *Carines, supra*.

According to defendant, MCL 769.34(10) violates the separation of powers provision of the Michigan Constitution because it infringes on the judiciary's power of appellate review of sentencing. See Const 1963, art 3, § 2; Const 1963, art 6, § 1. However, under art 4, § 45 of the Michigan Constitution "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). Therefore, because the Michigan Constitution grants the Legislature the authority to establish the sentencing scheme for criminal offenses, we conclude that MCL 769.34(10) does not unconstitutionally infringe on the judiciary's power to review sentencing.

Defendant next argues that MCL 769.34(10) operates as an unconstitutional violation of both procedural and substantive due process of law. The only authority defendant cites in support of his position is *Dodge v Detroit Trust Co*, 300 Mich 575; 2 NW2d 509 (1942). In *Dodge*, our Supreme Court held that denial of due process in a criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice." *Id.* at 618, quoting *Lisenba v California*, 314 US 219; 62 S Ct 280; 86 L Ed 166 (1941). As previously discussed, the Michigan Constitution grants the Legislature the ultimate authority for determining the appropriate sentencing scheme for our state. Const 1963, art 4, § 45. Accordingly, it is not fundamentally unfair for the Legislature to preclude appellate review of some sentences that are within the guidelines range because the Legislature is authorized by the Michigan Constitution to provide for penalties for criminal offenses.

Defendant also argues that MCL 769.34(10) deprives him of his constitutional right to an appeal by right. See Const 1963, art 1, § 20. However, MCL 769.34(10) does not completely preclude appellate review of a sentence that is within the sentencing guidelines range. Under the statute, this Court may review a sentence that is within the guidelines range if there was an error in scoring the sentencing guidelines or the trial court relied on inaccurate information in determining the defendant's sentence. See MCL 769.34(10); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). Accordingly, we conclude that MCL 769.34(10) does not unconstitutionally conflict with Const 1963, art 1, § 20 because it does not eliminate appellate review of a sentence that is within the sentencing guidelines range.

Defendant next argues that his 23 to 60 month sentence for the OUIL-third conviction is disproportionate. The legislative sentencing guidelines apply to defendant's sentences because defendant committed his offenses after January 1, 1999. See MCL 769.34(1) and (2). Under the legislative sentencing guidelines, this Court must affirm a minimum sentence within the sentencing guidelines range unless there was an error in scoring the guidelines or inaccurate information relied on in determining the sentence. MCL 769.34(10); *Leversee, supra*. The minimum guidelines range for OUIL-third with defendant's prior record variable and offense variable scores is 7 to 23 months. The trial court sentenced defendant to a minimum sentence of twenty-three months, which was within the guidelines range. Defendant has not alleged that there was an error in scoring the guidelines or that the trial court relied on inaccurate information in determining his sentence. Accordingly, this Court must affirm defendant's sentence. See *id.* at 337.

Defendant finally argues, in a supplemental brief in propria persona, that he was entitled to a sentence credit under MCL 769.11b for time that he was monitored by an electronic tether program and visitel monitoring system at his home prior to trial. We disagree.

MCL 769.11b, the sentencing credit statute, provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

The statute does not authorize a credit unless the defendant served time "in jail" before sentencing because of being denied or unable to furnish a bond for the offense of which the defendant was convicted. See *People v Whiteside*, 437 Mich 188, 196; 468 NW2d 504 (1991); *People v Scott*, 216 Mich App 196, 199-200; 548 NW2d 678 (1996). Here, defendant was not in jail prior to sentencing, he was confined to his home under the supervision of the electronic tether and visitel monitoring systems; therefore, he was not entitled to a sentencing credit under MCL 769.11b. See, also, *People v Smith*, 195 Mich App 147, 152; 489 NW2d 135 (1992) (confinement in one's home is not the equivalent of time spent in jail). Further, we decline to address the merits of defendant's constitutional challenge because it was not addressed by the trial court and was not properly addressed on appeal. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra